

IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

STATE OF IOWA, ex rel., IOWA)
DEPARTMENT OF NATURAL)
RESOURCES (99AG23542),)
)
Plaintiff,)
)
vs.)
)
BOYER'S SAND AND ROCK, INC., and)
WILLIAM BOYER,)
)
Defendants.)

LAW NO. _____

PETITION AT LAW

COMES NOW Plaintiff State of Iowa, ex rel., Iowa Department of Natural Resources ("DNR") and for its claims against Defendants Boyer's Sand and Rock, Inc., and William Boyer (collectively referred to herein as "Boyer") states as follows:

Introduction

1. The State of Iowa seeks assessment of a civil penalty, issuance of a permanent injunction, and enforcement of an administrative order against Boyer for violations of petroleum underground storage tank ("UST") requirements at a site located at 4162 Birch Ave, Hawarden, Iowa. The violations include Boyer's failure to permanently close USTs in accordance with DNR rules.

Parties

2. The State of Iowa is a sovereign state of the United States of America and brings this action on behalf of the DNR, a duly constituted agency of the State of Iowa. *See* Iowa Code § 455A.2 (2005).

3. William Boyer is a resident of Sioux County, Iowa, and is the sole corporate officer of Boyer's Sand and Rock, Inc.

4. Boyer's Sand and Rock, Inc., is an Iowa corporation with its principal place of business located in Hawarden, Sioux County, Iowa.

Jurisdiction

5. The DNR is authorized to regulate underground storage tanks ("USTs") containing regulated substances, including petroleum products, and to adopt rules relating to detection, prevention and correction of releases of regulated substances from such tanks. Iowa Code §§ 455B.471- 479.

6. The Environmental Protection Commission ("EPC") is authorized to adopt rules related to release detection and prevention, financial responsibility, tank closure, site assessment, risk classification, and corrective action applicable to all owners and operators of USTs. Iowa Code § 455B.474. The UST rules adopted by the EPC are contained in 567 Iowa Admin. Code chapters 135 and 136.

7. An "owner" of a UST is a person who owns the UST used for the storage, use, or dispensing of petroleum products. *See* Iowa Code § 455B.471(6)(a); 567 Iowa Admin. Code 135.2.

8. An "operator" of a UST is a person in control of, or having responsibility for, the daily operation of the UST. Iowa Code § 455B.471(5); 567 Iowa Admin. Code 135.2.

9. A UST must be permanently closed if it has been out of operation for more than twelve months. 567 IAC 135.15(1)(c).

10. To permanently close a UST, owners and operators must empty and clean them by removing all liquids and accumulated sludge, and either remove the UST from the ground or fill it with an inert solid material. 567 IAC 135.15(2)(b).

11. The DNR must be given notification of the date of the scheduled permanent closure prior to the closing. 567 IAC 135.15(2)(d).

12. Owners or operators must measure for the presence of a release where contamination is most likely to be present at the UST site during the process of permanently closing the UST. 567 IAC 135.15(3)(a)-(d).

13. For all permanent tank closures, at least one water sample must be taken from the first saturated groundwater zone via a monitoring well or borehole. 567 Iowa Admin. Code 135.15(3)(b).

14. If contaminated soils or groundwater are discovered, owners and operators must comply with the corrective action requirements contained in 567 IAC 135.7-135.12. 567 IAC 135.15(3)(g).

15. A closure report must be submitted to the DNR within 45 days of taking samples pursuant to a UST permanent closure. 567 IAC 135.15(3)(e).

16. Within 90 calendar days after a release of petroleum from a UST is confirmed, or another reasonable period of time determined by the DNR, owners and operators must submit a Tier 1 site assessment report to the DNR. 567 IAC 135.9(11)(a).

17. A “Tier 1 site assessment” is the evaluation of a site for the purpose of determining the concentrations of chemicals associated with a petroleum release and an accurate identification of the risks to human health and the environment. 567 IAC 135.9(1).

18. All assessment, corrective action, data analysis and report development must be conducted by or under the supervision of a certified groundwater professional. 567 IAC 135.8(2).

19. A Tier 2 site assessment must be conducted and a site cleanup report submitted for all sites which are not classified as “no action required” during the Tier 1 process. 567 IAC 135.10(1).

20. A Tier 2 site cleanup report must be submitted within 180 days of the date the DNR approves or is deemed to approve a Tier 1 assessment report under 567 IAC 135.19(12). 567 IAC 135.10(11)(a).

21. The DNR director is authorized to enforce the requirements of Iowa Code chapter 455B, Division IV, part 8, and rules adopted thereunder, by issuance of an administrative order directing a violator to desist in the practice which constitutes a violation, and to take necessary corrective action to ensure that the violation will cease. Iowa Code § 455B.476(1). The director may also impose appropriate administrative penalties. Iowa Code §§ 455B.109, 455B.476(1).

22. A person who violates a provision of Iowa Code chapter 455B, Division IV, part 8, or rule or order issued thereunder is subject to a civil penalty not to exceed five thousand dollars (\$5,000.00) for each day during which the violation continues. Iowa Code § 455B.477(1).

23. The Attorney General, at the request of the DNR director with approval of the EPC, shall institute any legal proceedings, including an action for injunction, necessary to enforce the penalty provisions of Iowa Code chapter 455B, Division IV, part 8, or to obtain compliance with the provisions of said part or the rules or orders issued thereunder. Iowa Code § 455B.477(3).

Facts

24. Defendant Boyer's Sand and Rock, Inc. is registered with the DNR as the owner of four 1000-gallon petroleum USTs located at 4162 Birch Ave, Hawarden, Iowa.

25. Defendant Bill Boyer had control of, and responsibility for, the daily operation of the USTs.

26. On August 25, 1997, Boyer submitted a notification of temporary closure of the USTs. Boyer certified the USTs would be temporarily closed as of August 30, 1997.

27. In a September 7, 1999 letter, the DNR notified Boyer the USTs had exceeded the one-year time period allowed for temporary tank closure, and directed him to permanently close the USTs pursuant to DNR rules by December 22, 1999. Boyer did not respond to this letter.

28. On May 17, 2002, the DNR sent a Final Notice to Boyer again directing him to permanently close the USTs pursuant to DNR rules. A Notification of Tank Closure form was enclosed with the letter and Boyer was given seven days to complete and return the form.

29. Boyer submitted a Notification of Tank Closure form, dated May 24, 2002, to the DNR indicating he intended to permanently close at least one UST on that same day by filling it in place with a solid inert material.

30. On June 5, 2002, the DNR sent a letter to Boyer informing him it received notice of the UST closure, and enclosed guidance for the closure. The DNR also directed Boyer to conduct required soil and groundwater testing at the time of the closure, and to submit a closure report to the DNR within 45 days of the permanent closure. Boyer did not respond to this letter, and no closure report was submitted to the DNR.

31. On December 14, 2003, the DNR director issued Administrative Order 2003-UT-19 to Boyer. A copy of the Order is attached hereto as Exhibit A, and by this reference is incorporated herein. The Order required Boyer to perform the following:

- a. provide a copy of a written contract to the DNR of the qualified contractor chosen to close the USTs within 14 days;
- b. submit a tank closure notification form to the DNR within 14 days;
- c. permanently close the USTs in conformance with DNR rules, conduct a soil and groundwater investigation and submit a closure report within 45 days;
- d. pay to the DNR an administrative penalty of \$2,380.00 within 60 days for violations of DNR UST rules.

32. Boyer's Sand and Rock, Inc. received Administrative Order No. 2003-UT-19 on November 25, 2003. Bill Boyer received Administrative Order No. 2003-UT-19 on December 2, 2003. A copy of the signed return receipts is contained on the last page of Exhibit A.

33. Bill Boyer filed a timely appeal on behalf of both respondents; however, default was granted to the DNR on May 9, 2005, for Boyer's failure to file a pleading in the appeal.

34. On July 26, 2005, the DNR received a check from Boyer in the amount of \$2,380.00 to satisfy the administrative penalty imposed by Administrative Order No. 2003-UT-19. Boyer, however, did not perform any of the actions required by Administrative Order 2003-UT-19.

Violations

35. Boyer failed to permanently close USTs that were out of operation for more than twelve months in violation of Administrative Order No. 2003-UT-19 and 567 Iowa Admin. Code 135.15(1)(c).

36. Boyer failed to give notification of the date of the scheduled permanent closure prior to the closing in violation of Administrative Order No. 2003-UT-19 and 135.15(2)(d).

37. Boyer failed to provide written notice to the DNR of the consultant chosen to close the USTs violation of Administrative Order No. 2003-UT-19.

38. Boyer failed to measure for the presence of a release during the process of permanently closing the UST in violation of Administrative Order No. 2003-UT-19 and 135.15(3)(a)-(d).

39. Boyer failed to submit a closure report to the DNR in violation of Administrative Order No. 2003-UT-19 and 135.15(3)(e).

WHEREFORE, Plaintiff State of Iowa ex rel., Iowa Department of Natural Resources requests that the Court:

- a. assess a civil penalty against Boyer pursuant to Iowa Code section 455B.477(1) (2005) for each day of violation of Administrative Order No. 2003-UT-19, 567 Iowa Admin. Code 135.15(1)(c), 135.15(2)(d), and 135.15(3)(a)-(e) not to exceed five thousand dollars (\$5,000) for each day of violation; and
- b. issue an order permanently enjoining Boyer from any further violation of Administrative Order No. 2003-UT-19, 567 Iowa Admin. Code 135.15(1)(c), 135.15(2)(d), 135.15(3)(a)-(e), and further requiring Boyer to:
 - (1) within 10 days, submit to the DNR the name of the certified groundwater professional retained to complete the UST closure and environmental assessment activities required by this order;
 - (2) within 45 days, permanently close the USTs in conformance with DNR rules and submit a closure report to the DNR;
 - (3) in the event contaminated soil or groundwater is encountered during the closure of the USTs, complete a Tier 1 site assessment and submit a Tier 1 report to the DNR within 90 days of the UST closing; and

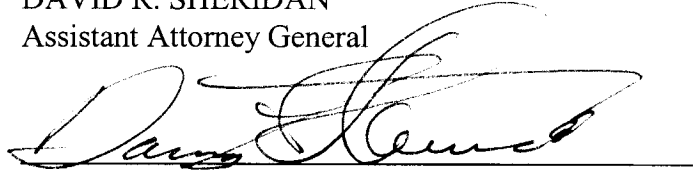
- (4) in the event the DNR approves or is deemed to approve the Tier 1 assessment report, and a no action required classification is not obtained, within 180 days of the approval complete a Tier 2 site assessment and submit to the DNR a Tier 2 site cleanup report as provided in 567 Iowa Admin. Code 135.10.

Plaintiff further requests such other relief the Court may deem just and proper and that the Court tax the costs of this action to the Defendants.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

DAVID R. SHERIDAN
Assistant Attorney General

A handwritten signature in black ink, appearing to read "David S. Steward", is written over a horizontal line.

DAVID S. STEWARD, PK1024804
Assistant Attorney General
Environmental Law Division
Lucas State Office Building
321 E. 12th, Room 18
Des Moines, Iowa 50319
TEL: (515) 281-5351
FAX: (515) 242-6072
E-MAIL: dstewar@ag.state.ia.us

ATTORNEYS FOR PLAINTIFF

IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE ORDER

IN THE MATTER OF:

BOYER'S SAND AND ROCK, INC. AND
WILLIAM BOYER

UST No. 8606120

ADMINISTRATIVE ORDER

2003-UT-19

TO: Boyer's Sand and Rock, Inc.
Reg. Agent Bill Boyer
9162 Birch Ave.
Hawarden, IA 51023

Bill Boyer
9162 Birch Ave.
Hawarden, IA 51023

SUMMARY

This order requires you to permanently close your underground storage tanks ("USTs") by removing the USTS or filling them in place, completing a soil and groundwater investigation of the tank site and submitting a tank closure report in compliance with 567 I.A.C. 135.15(455B). You are required to give the Iowa Department of Natural Resources ("Department") written notice prior to any tank removal or filling in place and any soil and groundwater testing. See Division V below..

You are required to pay a penalty of \$2,380 to the Department within sixty (60) days of receipt of this order unless the order is appealed as provided in Division VII, below.

Any questions regarding this order should be directed to:

Relating to technical requirements:

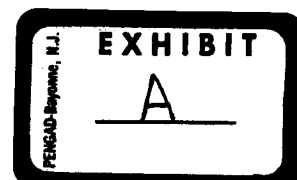
Thomas Collins
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: 515/281-8879

Relating to appeal rights:

David Wornson
Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, Iowa 50319-0034
Ph: 515/242-5817

II. JURISDICTION

This order is issued pursuant to Iowa Code section 455B.476, which authorizes the Director of the Department to issue any order necessary to secure compliance with or



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prevent a violation of Iowa Code chapter 455B, Division IV, Part 8, and the administrative rules contained in 567 Iowa Administrative Code (IAC) 135. Iowa Code sections 455B.109 and 455B.476 and agency rules contained in 567 IAC 10 authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

1. Boyer's Sand & Rock, Inc. is registered with the Department as the owner of four petroleum underground storage tanks (USTS) located at 4162 Birch Avenue, Hawarden, Iowa. Department records indicate that these USTS were in operation as of July 1, 1985.
2. Boyer's Sand & Rock, Inc. (Boyer) is an Iowa Corporation. Bill Boyer is the sole corporate officer and the person who has exercised control or has the authority to control the daily operation, maintenance and regulatory status of the USTS at this site.
3. These USTS were taken out of operation and certified as temporarily closed in approximately August 1997.
4. The Department sent a compliance notice to Boyer dated September 7, 1999 notifying it of the regulatory duty to permanently close these USTS by removal or filling in place, completion of a soil and groundwater investigation and submittal of a report. The closure process was to be completed by December 22, 1999. Boyer failed to reply or comply.
5. The Department sent a final notice to Boyer by certified mail dated May 17, 2002 requiring permanent closure within sixty (60) days. Boyer acknowledged receipt of the final notice on May 23, 2002. On May 24, 2002, the Department received a notice of tank closure stating a proposed date for filling the tank in place of May 25, 2002. The Department did not receive further communication to confirm the actions and did not receive a tank closure report.
6. The Department sent a compliance notice dated June 5, 2002 notifying Boyer that a closure notification form had been received but that the Department had not received a closure report documenting the filling in place or the soil and groundwater investigation. The notice required Boyer to complete the closure process and submit a report. The Department received no response to the letter.
7. To date, the Department has not received a tank closure report documenting the tank removal or filling in place or that a soil and groundwater investigation has been completed.

IV. CONCLUSIONS OF LAW

1. Iowa Code Chapter 455B, Division IV, Part 8 (§§ 455B.471-455B.479) establish the Underground Storage Tank program. Iowa Code section 455B.472 declares that the release of regulated substances (including petroleum product) from underground storage tanks constitutes a threat to the public health and safety and to the natural resources of the state. Iowa Code section 455B.474 gives the Environmental Protection Commission ("Commission") authority to adopt rules relating to release detection, UST standards, maintenance of records, release reporting, UST closure and corrective action applicable to all owners and operators of underground storage tanks. The Commission adopted such rules in Chapters 567 I.A.C. 135 & 136.

2. Iowa Code § 455B.471(6) defines "owner" of an UST. These USTs have been in use since July 1, 1985; and, therefore, Boyer's Sand & Rock, Inc. is an owner as defined and responsible for compliance with the terms of this order.

3. Iowa Code § 455B.471(5) defines "operator" of an UST. Bill Boyer is an operator as defined and responsible for compliance with the terms of this order.

4. The rules governing permanent closure of USTs are found in 567 I.A.C. 135.15(2). Pursuant to those rules, any UST that is temporarily closed for more than twelve (12) months must be permanently closed either by removal or by filling in place with an inert material unless the tanks meet the tank system performance and upgrade standards in 567 I.A.C. 135.3(1) & (2). See 567 I.A.C. 135.15(1). Owners and operators of the USTs are required to conduct a site investigation, including soil and water sample analysis, to determine if a release of a regulated substance has occurred. 567 I.A.C. 135.15(3). A closure report must be submitted to the Department within forty-five (45) days of tank removal or filling in place. 567 I.A.C. 135.15(3)"e". An owner or operator must give the Department at least thirty (30) days notice of his intent to close any UST. 567 I.A.C. 135.15(2). In the alternative, the UST system must be upgraded pursuant to 567 I.A.C. 135.15(1)"c".

4. As a part of the closure process, soil samples from the UST site must be analyzed for benzene, toluene, ethylbenzene and xylenes. If petroleum substances other than gasoline or gasoline blends have been used or if the history of usage is unknown, soils must be tested for total extractable hydrocarbons (TEH). 567 I.A.C. 135.15(3)"a". The minimum requirements for the placement and depth of soil samples to detect the presence of releases around the tank and the tank piping are described in 567 I.A.C. 135.15(3)"c" & "d". Groundwater samples must be analyzed for benzene, toluene, ethylbenzene and xylene. If there has been a history of usage of petroleum substances other than gasoline (i.e. diesel, kerosene, waste oil) or the history is unknown, samples must be tested for TEH. See 567 I.A.C. 135.15(3)"b". 567 I.A.C. 135.15(3)"a".

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5. A closure report must be submitted to the Department within forty five (45) days of tank removal or filling in place. 567 I.A.C. 135.15(3)"e". The report must include all laboratory analytical reports, soil boring and well or borehole construction details and stratigraphic logs, and a dimensional drawing showing the location and depth of all tanks, piping, sampling, wells or boreholes and contaminated soil encountered. Id.

6. Boyer's Sand & Rock, Inc. and Bill Boyer have failed to complete permanent closure of the USTs by documenting a tank removal or filling in place, conducting a soil and groundwater investigation and submitting a proper closure report to the Department in violation department rule 567 I.A.C. 135.15.

V. ORDER

THEREFORE, you are ordered to comply with the following provisions:

1. Within fourteen (14) days of receipt of this order, submit the name of the contractor retained to complete the UST closure, closure investigation and report and an enforceable contract the terms of which obligate the contractor to complete this project in accordance with this order and Department rules. If the USTS have been removed or filled in place you are required to document that action in a closure report in accordance with Department rule 135.15 and paragraph three (3) below.

2. Within fourteen (14) days of receipt of this order, submit a tank closure notification form to the Department stating the date for UST removal or filling in place and soil and groundwater sampling. You must notify the Department field office 24 hours in advance of any tank removal or filling place or soil and groundwater investigation activities. Soil and groundwater samples will not be accepted without Department supervision unless waived in writing.

3. Within thirty (45) days of receipt of this order, you are required to complete the removal or filling in place of the USTS, conduct a closure soil and groundwater investigation and submit a complete tank closure report in accordance with rule 135.15 and the tank closure guidance a copy of which is attached.

4. Pay to the order of the Iowa Department of Natural Resources a penalty of \$2,380 within sixty (60) days of receipt of this order unless the order is appealed as provided in Division VII.

VI. PENALTY

1. The Director, with the approval of the Environmental Protection Commission (EPC), may request that the Iowa Attorney General institute legal proceedings pursuant to Iowa Code section 455B.477 in response to violations of the type cited in this order. Civil penalties of up to \$5,000.00 per day may be assessed for each day during which the violations continue.

2. Iowa Code sections 455B.476 and 455B.109 authorize the Department to assess administrative penalties of up to \$10,000.00 for violations of Iowa Code chapter 455B or rules, permits and orders promulgated or issued pursuant to chapter 455B. The EPC has adopted rules regarding penalty assessment in chapter 567 IAC. 10. Pursuant to 567 I.A.C. 10.2, the Department has determined that the most equitable and efficient means of redressing and abating the violations cited in this order is through the issuance of an administrative order with a penalty. The administrative penalty assessed by this order is determined as follows, although the Department reserves the right to modify the rationale.

ECONOMIC BENEFIT: The parties have earned the interest on the cost of compliance over the period of time compliance with tank closure process has been delayed. The Department has not confirmed if the tanks have been removed or filled in place or that a closure investigation has been conducted. Assuming the tanks have been filled in place, the cost of the tank closure investigation is estimated to be \$1,000. Closure should have been completed by at least January 2000 and therefore the report is at least 47 months overdue. Applying an interest rate of 0.8% per month, ($\$1,000 \times .008 \times 47 = \376), \$380 is assessed for this factor.

GRAVITY OF THE VIOLATION: Proper closure of USTs is required to assure that the site is not presently contaminated and to prevent the movement of contamination. Delays in closure can result in continued release from the tanks as well as spreading of undetected contamination and delays further corrective action if contaminated. Continued noncompliance results in significant expenditure of Department time and resources to monitor the status of the site. The closure investigation and report are over 47 months overdue. For this factor, \$1,000 is assessed.

CULPABILITY: The parties have been informed repeatedly of the regulations of the Department. The parties have been given adequate time to schedule a permanent closure of the USTs and perform the closure investigation. The parties' failure to comply indicates at least a negligent disregard of Department rules and authority. For this factor, \$1,000 is assessed.

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VII. APPEAL RIGHTS

Pursuant to Iowa Code section 455B.476 and 567 I.A.C. 7.5(1), a written Notice of Appeal may be filed within (30) days of receipt of this order. The Notice of Appeal should be filed with the Director of the Department of Natural Resources. You must identify the specific portion(s) of this order that you are appealing, and include a short and plain statement of your reason(s) for appeal. A contested case hearing will be held pursuant to Iowa Code chapter 17A and 561 I.A.C. 7.

VIII. NONCOMPLIANCE

Failure to comply with this order may result in the imposition of additional administrative penalties against you or referral of this case to the Iowa Attorney General. In the event that this case is referred to the Attorney General, injunctive relief and civil penalties may be ordered against you pursuant to Iowa Code section 455B.477. The Department reserves the right to request that the Attorney General initiate legal action based on the violations alleged in this order and any subsequent violations, including failure to timely pay any penalty assessed in this order.

Dated this 14 day of November, 2003



JEFFREY R. VONK, DIRECTOR

IOWA DEPARTMENT OF NATURAL RESOURCES

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits. *mc hf*

1. Article Addressed to:

BOYERS SAND & ROCK INC
REG AGENT BILL BOYER
4162 BIRCH AVENUE
HAWARDEN IA 51023

2. Article Number

(Transfer from service label)

70067000952910463

PS Form 3811, August 2001

Domestic Return Receipt

102595-02-M-1540

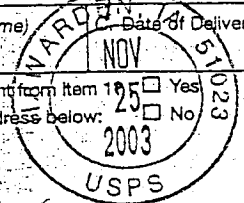
COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *John Blankenship*☐ Agent☒ Addressee

B. Received by (Printed Name)

Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☒ No

3. Service Type

☒ Certified Mail☐ Express Mail☐ Registered☐ Return Receipt for Merchandise☐ Insured Mail☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits. *mc hf*

1. Article Addressed to:

BILL BOYER
9162 BIRCH AVENUE
HAWARDEN IA 51023

2. Article Number

(Transfer from service label)

70067000952910456

PS Form 3811, August 2001

Domestic Return Receipt

102595-02-M-1540

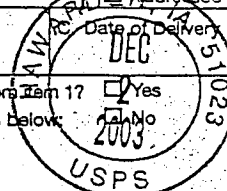
COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *John Blankenship*☐ Agent☒ Addressee

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Date of Delivery

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4. Restricted Delivery? (Extra Fee)

☐ Yes